

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ITV GURNEY HOLDING INC.,
et al.,

Plaintiffs and Appellants,

v.

SCOTT GURNEY et al.,

Defendants and Respondents.

B286442

(Los Angeles County
Super. Ct. No. BC 643237)

APPEAL from an order of the Superior Court of
Los Angeles County, Susan Bryant-Deason, Judge. Reversed.

Munger, Tolles & Olson, Fred A. Rowley, Jr., Mark R.
Yohalem, John L. Schwab, and Nicholas S. Dufau for Plaintiffs
and Appellants ITV Gurney Holding Inc., ITV America, Carlton
Communications Limited, Brent Montgomery, Andrew Garard
and David McGraynor.

Hogan Lovells US, Paul B. Salvaty, Megan Dixon,
Poopak Nourafchan, and Laura M. Groen for Plaintiff and
Appellant Gurney Productions, LLC.

Kendall Brill & Kelly, Philip M. Kelly, Nicholas F.
Daum; White & Case, Bryan A. Merryman; Lavelly & Singer,
and Michael E. Weinsten for Defendants and Respondents
Scott Gurney, Deirdre Gurney and Little Win LLC.

Appellants challenge the trial court's order denying their anti-SLAPP motion. (See Code Civ. Proc., § 425.16.) For the reasons we discuss below this was error.

This appeal is the latest, but by no means the final, stage in litigation between appellants, a number of entities associated with the British media company ITV,¹ and respondents, Scott and Deirdre Gurney and their holding company, Little Win LLC (collectively the Gurneys).

ITV invested approximately \$40 million to obtain a majority ownership stake in the Gurneys' television production company, Gurney Productions, LLC. The Gurneys retained a minority stake. Later, ITV discovered evidence of what it believed was misconduct by the Gurneys in the operation of Gurney Productions. ITV fired the Gurneys from their positions as co-CEO's of Gurney Productions and filed suit. The Gurneys filed a cross-complaint.

In an opinion filed December 5, 2017, we held that the trial court erred by granting a preliminary injunction allowing the Gurneys to maintain their position running the day-to-day operations of Gurney Productions following their removal as co-CEO's. (See *ITV Gurney Holding v. Gurney* (2017) 18 Cal.App.5th 22.) That decision did not end the litigation, however. ITV filed a special motion to strike portions of the Gurneys' cross-complaint pursuant to the anti-SLAPP statute. ITV alleged that portions of the Gurneys' claims arose from settlement negotiations that took place at December 2016 meetings of the Gurney Productions board. According to ITV,

¹ In addition to ITV corporate entities, appellants include Gurney Productions, LLC, the company majority owned by an ITV affiliate and minority owned by respondents, as well as individual Gurney Productions board members who were appointed by ITV. For the sake of simplicity, we refer to appellants collectively as ITV except where necessary to distinguish among them.

the meeting therefore constituted protected activity under the anti-SLAPP statute. The trial court denied the motion, and we reverse.

FACTS AND PROCEEDINGS BELOW

The Gurneys produce reality television shows, including, most notably, *Duck Dynasty*. In 2012, they reached an agreement to sell a majority interest in their production company, Gurney Productions, to ITV. Under the terms of the Gurney Productions operating agreement, ITV was entitled to appoint the majority of the members of the Gurney Productions board, as well as its chief financial officer. The Gurneys remained as co-CEO's and handled the company's day-to-day operations.

In the autumn of 2016, Gurney Productions's ITV-appointed chief financial officer approached ITV's board members with concerns regarding the Gurneys' operation of the company. ITV investigated and came to believe that the chief financial officer's concerns were well-founded. ITV planned to confront the Gurneys with these accusations at a Gurney Productions board meeting on December 5, 2016. An ITV employee circulated an agenda for the board meeting with the first item reading "Future of Deirdre, Scott and ITV path to ownership." ITV suggested that the Gurneys bring attorneys to that portion of the meeting.

At the December 5 meeting, the ITV board members alleged that the Gurneys had committed misconduct in three ways. First, they claimed that the Gurneys had engaged in self-dealing by selling the rights to a television program known as *Northern Territories* without informing the ITV board members that the buyer of the program was a company controlled by the Gurneys themselves. By selling the rights in this manner, the Gurneys inflated the earnings of Gurney Productions in a way that might allow them to obtain more money in a subsequent

sale of the company. Second, the ITV directors alleged that the Gurneys had used approximately \$850,000 in company funds to pay for their personal expenses and had failed to reimburse the company. Third, they alleged that the Gurneys had improperly poached talent from Gurney Productions to work at the Gurneys' new company.

An ITV board member proposed two possible courses of action. ITV was prepared to pay the Gurneys \$33 million to buy out their remaining stake in Gurney Productions. In addition, ITV and the Gurneys would agree to release all potential claims against one another. If the Gurneys did not agree to these terms, the ITV board members would follow the procedure laid out in the operating agreement: They would convene another board meeting three days later to consider the Gurneys' evidence and reach a final decision about their status. If the ITV board members concluded that the Gurneys had committed misconduct, they would terminate the Gurneys for cause and exercise the option under the operating agreement to buy the Gurneys' remaining stake in Gurney Productions pursuant to a fixed formula, which the ITV board member estimated would result in a price of approximately \$27 million. An ITV board member cautioned the Gurneys that news of the Gurneys' termination would almost inevitably leak to the press, an eventuality that the ITV board member believed all sides would prefer to avoid.

The Gurneys refused ITV's offer. At a second meeting held on December 8, 2016, both sides had litigation counsel present. The ITV board members concluded that the Gurneys had indeed committed misconduct and terminated them for cause.

On December 9, 2016, the next day after the second board meeting, ITV sued the Gurneys for breach of contract, breach of fiduciary duties, and other claims. The Gurneys filed a separate suit against ITV and ITV's board members for breach of fiduciary

duty, breach of contract, civil extortion,² invasion of privacy, violation of Penal Code section 502,³ conversion, and declaratory injunctive relief. On the same day, the Gurneys also filed a cross-complaint against ITV in the first action. In May 2017, the trial court consolidated these actions, and on July 17, 2017, the Gurneys filed the operative first amended cross-complaint against ITV.

On August 30, 2017, ITV filed an anti-SLAPP motion seeking to strike portions of the first amended cross-complaint. The motion did not target any of the Gurneys' causes of action as a whole. Instead, it sought to strike three specific allegations within the Gurneys' causes of action for breach of contract and breach of fiduciary duty, as well as most references to statements and actions that occurred during the December 5 and December 8 board meetings. The trial court denied the motion.

DISCUSSION

ITV contends that the trial court erred by denying the anti-SLAPP motion. It argues that the December 5 and December 8 board meetings constituted protected activity under the anti-SLAPP statute. It argues further that the Gurneys cannot establish a probability of succeeding on their claims arising from those meetings because the statements the ITV directors made were entitled to the protection of the litigation privilege. (Civ. Code, § 47, subd. (b).) We agree and reverse.

² The Gurneys voluntarily withdrew their extortion cause of action after ITV filed an earlier anti-SLAPP motion.

³ Penal Code section 502 prohibits “tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems.” (Pen. Code, § 502, subd. (a).)

I. The Anti-SLAPP Statute

The anti-SLAPP statute allows a defendant in a civil case to make a special motion to strike any cause of action “arising from any act of [the defendant] in furtherance of the [defendant]’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (Code Civ. Proc., § 425.16, subd. (b)(1).) The motion should be granted “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (*Ibid.*) Under the statute, the act in furtherance of a defendant’s right of petition or free speech includes: “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (*Id.*, subd. (e).)

In ruling on a motion to strike pursuant to Code of Civil Procedure section 425.16, a court must employ a two-step process. “First, the defendant must establish that the challenged claim arises from activity protected by [Code of Civil Procedure] section 425.16. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712) If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a ‘summary-judgment-like procedure.’” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

The denial of a motion to dismiss a cause of action under the anti-SLAPP statute is immediately appealable. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) We review a trial court’s ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

II. Arising from Protected Activity

ITV contends that the Gurneys’ complaint contains mixed causes of action or, in other words, causes of action “alleging both protected and unprotected activity.” (*Baral, supra*, 1 Cal.5th at p. 382.) For this reason, its anti-SLAPP motion does not seek to strike the Gurneys’ cross-complaint in its entirety, nor even any cause of action in its entirety. Instead, ITV has moved to strike three allegations that appear within the Gurneys’ causes of action for breach of fiduciary duty and breach of contract.⁴ These allegations are that ITV wronged the Gurneys by:

“Manufacturing knowingly false allegations against the Gurneys for the improper purpose of damaging their reputations and pressuring them into relinquishing their remaining membership interest at a grossly deflated price”; “[p]roviding the Gurneys with a false agenda for the December 5, 2016 [b]oard meeting for the purpose of springing an unfair surprise”; and “[f]ailing and refusing to properly consider in good faith the evidence and arguments presented by the Gurneys and their counsel at the December 8, 2016 [b]oard meeting.”

In addition, ITV seeks to strike portions of the Gurneys’ factual allegations pertaining to the December 5 and December 8 meetings, including the accusations ITV made against the Gurneys and ITV’s proposal to buy out the Gurneys at a reduced price.

ITV contends that the board meetings on December 5 and December 8 constituted protected activity because they were

⁴ The allegations are identical in both causes of action.

settlement negotiations. Numerous cases have held that “[c]ommunications in the course of settlement negotiations are protected activity within the scope of [Code of Civil Procedure] section 425.16.” (*Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal.App.5th 118, 123.) ITV argues that the board meetings were settlement negotiations because ITV offered the Gurneys \$33 million to purchase their stake in Gurney Productions and to end the dispute among the parties. Furthermore, ITV argues that, by filing suit against the Gurneys the day after the second board meeting, it showed that it was contemplating litigation seriously and in good faith at the time it made the offer to buy out the Gurneys.

The Gurneys deny that the board meetings were settlement negotiations, but this position is inconsistent with the Gurneys’ own description of the content of the meetings. According to Deirdre Gurney’s declaration, an ITV director alleged that the Gurneys committed misconduct and told them that if the ITV board members concluded at the December 8 meeting that the allegations were true, they would terminate the Gurneys and exercise the call option to buy the Gurneys’ remaining ownership stake for \$28 million. The director then proposed avoiding this outcome by offering to buy the Gurneys out for \$33 million. Regardless of whether the term “settlement” was used, it is impossible to understand the offer as anything else. The parties spent most of the remainder of the meeting discussing the relative strengths of their positions in potential litigation. The December 5 meeting was thus a settlement negotiation. The December 8 meeting also constituted protected activity because it was a continuation of the process begun at the December 5 meeting and because ITV’s actions were directed at achieving the objects of the potential litigation. (See *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 284.)

Furthermore, ITV demonstrated that it was seriously contemplating litigation at the time of the meetings when it filed

a lawsuit against the Gurneys the day after the second board meeting. The Gurneys contend that the statements could not have been settlement negotiations because they occurred at a meeting of a corporate board of directors, but they cite nothing in the law that would preclude such a determination. Having concluded that the meetings met all the other requirements for settlement negotiations, we see no reason why the setting of the discussion should preclude the conclusion that they were in fact settlement negotiations.

Because we reach this conclusion, we need not address ITV's contention that the Gurneys should be judicially estopped from denying that the meetings were settlement negotiations. ITV argues that estoppel should apply because at an earlier point in the litigation, the Gurneys successfully objected to portions of a sworn statement by an ITV director regarding his statements at the board meetings on the ground that the statements were privileged settlement communications. Similarly, we deny as moot ITV's motion to strike the Gurneys' denials that the meetings were settlement negotiations on the ground that these denials are deliberately misleading or false in light of the Gurneys' own recording of the meeting. Because we have determined that the December 5 meeting was a settlement negotiation, we need not review this question.⁵

⁵ We note, however, that Deirdre Gurney's declaration, as well as the Gurneys' appellate brief, inaccurately describe the contents of the December 5 board meeting. Scott Gurney made a full recording of that meeting, a copy of which the Gurneys provided to ITV during discovery. During the recording, an ITV director offers to pay the Gurneys "\$33 million" as a "full and final settlement for any financial obligations that you think we owe you." In exchange, the Gurneys would need to "release any final claims" against ITV. The director states, "That's an offer that's on the table today." The ITV director states that the alternative, if the Gurneys were terminated and objected to receiving \$27 million to \$29 million, would be to "dispute that

Having established that the board meetings were protected activity, the next question is whether the challenged claims are “based on” that protected activity. (*Baral, supra*, 1 Cal.5th at p. 395.) “Assertions that are ‘merely incidental’ or ‘collateral’ are not subject to [Code of Civil Procedure] section 425.16.” (*Id.* at p. 394.) A claim is not based on protected activity if “the allegations [of protected activity] are merely background or provide context” to the claim. (*Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, 1170.)

In this case, the settlement negotiations were not merely incidental to the challenged claims for relief. This is particularly apparent with respect to the Gurneys’ allegation that ITV breached its fiduciary duties and its contracts with the Gurneys by “[m]anufacturing knowingly false allegations against the Gurneys for the improper purpose of damaging their reputations and pressuring them into relinquishing their remaining membership interest at a grossly deflated price.” ITV’s settlement proposal was an indispensable part of this claim. It was the means by which, according to the Gurneys’ allegation, ITV proposed a deflated purchase price for Gurney Productions. The remaining claims are similar. If ITV provided “the Gurneys with a false agenda for the December 5, 2016

[and] go to court.” Throughout the remainder of the recording, both sides talk extensively about the strengths of their legal positions and how the dispute would likely play out in court.

The contents of the recording are inconsistent with Deirdre Gurney’s statement that the “ITV [m]anagers did not suggest, propose, or verbalize in any way that their [\$33 million] offer was a settlement proposal.” The Gurneys’ appellate brief states, on the basis of Deirdre Gurney’s declaration, that “litigation was not even mentioned at this December 5 meeting, nor was settlement proposed.” The brief also claims that ITV board members “falsely” characterized their buyout offer “as a ‘settlement’ proposal.”

[b]oard meeting for the purpose of springing an unfair surprise,” this was objectionable because the unfair surprise included an attempt to convince the Gurneys to sell Gurney Productions. Likewise, it is impossible to separate ITV’s alleged failure “and refus[al] to properly consider in good faith the evidence and arguments presented by the Gurneys and their counsel at the December 8, 2016 [b]oard meeting” from their settlement proposal and from the lawsuit that followed almost immediately.

The Gurneys argue that these allegations cannot be based on protected activity because they are based on actions ITV took outside the December 5 meeting. For example, ITV’s representatives prepared and sent the agenda for the meeting in advance of the meeting itself. This is immaterial. In the case of an anti-SLAPP motion filed on the basis of connection to litigation, “[t]he first prong of the [Code of Civil Procedure] section 425.16 analysis is satisfied so long as the record does not show as a matter of law that [the defendant’s] conduct had ‘no “connection or logical relation” to an action and [was] not made “to achieve the objects” of any litigation.’” (*Birkner v. Lam*, *supra*, 156 Cal.App.4th at p. 284.) The allegations in this case meet that standard.

III. Probability of Success

At the second prong of the anti-SLAPP analysis, the plaintiff bears the burden “to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken.” (*Baral, supra*, 1 Cal.5th at p. 396.) ITV contends that the Gurneys cannot meet their burden even at this stage because the litigation privilege absolutely protects ITV from liability. We agree.

The litigation privilege under Civil Code section 47, subdivision (b) “ ‘applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. . . . The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.’ ” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The privilege extends to cover communications prior to litigation (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1196; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 19–20), so long as “the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by . . . a possible party to the proceeding.” (*Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 393.) The privilege is absolute, and a “ ‘plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant’s liability on the claim.’ ” (*Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 814.)

The Gurneys are correct that “[t]he analysis required to determine whether the litigation privilege applies to a prelitigation communication involves a question of fact.” (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1252, fn. 6.) But as we have already seen, the facts as the Gurneys describe themselves are unambiguous on this matter: The ITV board members presented the Gurneys with a settlement offer, at a time when ITV was actually contemplating and seriously considering litigation. (See *id.* at p. 1244 [“ ‘ “[W]hen there is a good faith intention to bring a suit, even malicious publications ‘are protected as part of the price paid for affording litigants the utmost freedom of access to the

courts.’ ” ’ ”].) Furthermore, the discussions regarding settling the litigation by paying the Gurneys for their stake in the company were made to achieve the objects of the litigation.

IV. Factual Allegations

Because the trial court denied ITV’s anti-SLAPP motion in its entirety, it made no findings regarding whether the factual allegations that ITV challenged were relevant to any of the Gurneys’ other claims in the lawsuit. When an anti-SLAPP motion successfully challenges a claim for relief, “[a]llegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (*Baral*, *supra*, 1 Cal.5th at p. 396.) Thus, unless the Gurneys can show that the challenged factual allegations support some other surviving claim for relief, those factual allegations must also be stricken.

In its anti-SLAPP motion, ITV seeks to strike virtually all mentions of the December 5 meeting, along with portions of the descriptions of the December 8 meeting, from the Gurneys’ cross-complaint. We agree with the Gurneys that some of the factual allegations pertaining to these meetings are relevant to at least one of the Gurneys’ claims that remain in the complaint. In particular, the Gurneys allege that ITV breached its contract and its fiduciary duties to the Gurneys by “[r]efusing to provide the Gurneys with notice of the alleged breaches and an opportunity to cure.” The Gurneys may present evidence of the December 5 board meeting and the events leading up to it to the extent it is relevant to show that ITV did not provide them with notice of the alleged breaches or an opportunity to cure them. In addition, some of the other statements among the challenged factual allegations do not describe protected activities, and these may remain in the complaint.

The following factual allegations in the Gurneys' cross-complaint pertain only to the stricken claims and must be stricken:

Paragraphs 5 and 7 in their entirety, and the sentences in paragraph 6 reading, "With full confidence that they had done nothing wrong, the Gurneys refused to succumb to [c]ross-[d]efendants' strong-arm tactics and left the meeting. **Less than two hours later**, [c]ross-[d]efendants made good on their threats."

Paragraph 43, from its beginning through the phrase "the Gurneys' Employment Agreements."

Paragraph 44, the phrase, "contrary to the [b]oard members' allegations."

Paragraph 45, the sentence reading, "When later confronted with incontrovertible evidence disproving ITV's non-compete claim, the ITV-appointed [b]oard members made the ridiculous and unsubstantiated claim that 'reality-based' programming includes game shows."

Paragraph 46, the sentence reading, "As yet another example of [c]ross-[d]efendants' bad faith and breach of fiduciary duties, Montgomery, Garard and McGraynor attempted to claim that the Gurneys had engaged in improper self-dealing by purchasing from Gurney Productions the rights to a failed show called *Northern Territories*, which the Gurneys had hoped to turn into a documentary."

Paragraph 47, beginning with "following the assertion of this bogus self-dealing claim."

Paragraph 48, the sentence reading, "As yet another example of the bad faith claims asserted by ITV, ITV claimed that Scott Gurney 'ordered that a payment of \$350,000 be made to Little Win' to meet personal obligations." Also, the sentence beginning: "Indeed, although ITV . . ."

Paragraph 49, the following phrases: “The ITV-appointed [b]oard members also attempted to paint other” and “as scandalous, when in fact they.”

Paragraphs 50, 51, 52, and 53, in their entirety.

Paragraph 54, the sentence reading, “The [c]ross-[d]efendants almost immediately made good on their threat.”

Paragraph 57, in its entirety.

DISPOSITION

The trial court's order is reversed. The trial court shall issue an order granting the anti-SLAPP motion and striking the portions of the Gurneys' complaint as described above. Appellants' motion to strike or remand is denied as moot. Appellants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

CURREY, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.